Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1246

FRANK P. PARISH AND THEODORE FISHER PARISH,
Petitioners,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 28, 1979

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TABLE OF CONTENTS

Page

MOTION TO DISMISS PETITION FOR CERTIORARI 1

OPINIONS BELOW 2

THIS COURT'S LACK OF JURISDICTION 2

STATUTES AND RULES OF THIS COURT INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 3

ARGUMENT:

I. THE PETITION FOR CERTIORARI MUST BE DISMISSED FOR WANT OF STATUTORY JURISDICTION, SAID PETITION HAVING BEEN FILED MORE THAN NINETY (90) DAYS AFTER ENTRY OF THE COURT OF APPEALS' JUDGMENT, IN VIOLATION OF 28 U.S.C. 2101(c) AND RULE 22 OF THIS COURT'S RULES 9

II. THE PETITION FOR CERTIORARI IS ALSO GROUNDLESS BECAUSE IN SUBSTANCE, IT RAISES FOR RELITIGATION ESSENTIALLY THE SAME ISSUES SETTLED BY THIS COURT'S DENIAL OF CERTIORARI EIGHT (8) YEARS AGO IN *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, ET AL., 261 MD. 618, 277 A.2D. 19, *Cert. Denied*, 404 U.S. 940 (1971) 10

CASES: Page

Citizens Bank of Michigan City v. *Opperman*, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919) 9
Cole v. *Violette*, 319 U.S. 581, 63 S.Ct. 1204 (1943) 9
Collard v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918) 9
Glasgow Navigation Company, Ltd. v. *Munson Steamship Line*, 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918) 9
Hartford Accident & Indemnity Co. v. *Bunn*, 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed. 1301 9
Matton Steamboat Co. v. *Murphy*, 319 U.S. 412, 415, 63 S.Ct. 1126 (1943) 9, 10
Parish v. *Maryland and Virginia Milk Producers Association, Inc.*, 261 Md. 618, 277 A.2d 19, *cert. denied*, 404 U.S. 940 (1971) 4, 5, 6, 7, 10
Rust Land & Lbr. Co. v. *Jackson*, 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919) 9, 10
Toledo Scale Company v. *Computing Company*, 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923) 9
Whitsitt v. *Union Depot and Railroad Company*, 122, U.S. 363, 7 S.Ct. 1248, 30 L.Ed. 1150 (1887) 9

STATUTES AND RULES:

28 U.S.C. 2101(c) 2, 3, 9
Rule 22 Supreme Court Rules 2, 3, 9

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BRIEF OF RESPONDENT MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS PETITION FOR WANT OF STATUTORY JURISDICTION, AND BECAUSE THE ISSUES RAISED BY THE PETITION WERE SETTLED BY THIS COURT'S DENIAL OF CERTIORARI IN A CASE BETWEEN THE SAME PARTIES EIGHT YEARS AGO

Respondent Maryland and Virginia Milk Producers Association, Inc. hereby submits this brief in opposition to the petition for certiorari herein, and it moves

to dismiss said petition on the grounds (a) that this Court lacks statutory jurisdiction over this case, the petition for certiorari having been filed on February 12, 1979, more than ninety (90) days after entry of the Court of Appeals' judgment herein on November 3, 1978, and (b) that the issues raised by the petition were settled by this Court's denial of certiorari in a case between the same parties eight (8) years ago.

OPINIONS BELOW

The unreported November 3, 1978 opinion and judgment of the United States Court of Appeals for the Fourth Circuit are printed in the Appendix to the Petition for Certiorari at pages A-1 through A-6.

The unreported opinion of the United States District Court for Maryland, which was unanimously affirmed by the Court of Appeals' judgment, is also printed in the Appendix to the Petition for Certiorari at pages A-7 through A-18.

THIS COURT LACKS JURISDICTION

This Court does *not* have jurisdiction over this case because the petition for writ of certiorari was not filed until February 12, 1979, a date more than ninety (90) days after entry of the Court of Appeals' judgment of November 3, 1978, in violation of the provisions of 28 U.S.C. 2101(c) and Rule 22 of the Supreme Court Rules.

STATUTES AND RULES INVOLVED

(a) Title 28 U.S.C. 2101(c), as here relevant, provides:

> "*Supreme Court; Time For Appeal Or Certiorari; Docketing* . . .

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of said judgment or decree . . . ."

(b) Rule 22(3) of the Supreme Court Rules, in turn, provides as here relevant:

> "*Review On Certiorari—Time For Petitioning.*
>
> "3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law."

QUESTIONS PRESENTED

1. Does this Court have statutory jurisdiction to entertain a petition for writ of certiorari in a civil case wherein the petition was filed more than ninety (90) days after the date of entry of the Court of Appeals' judgment, in violation of 28 U.S.C. 2101(c) and Rule 22(3) of this Court's Rules?

2. Should this Court even consider a petition for certiorari in a case where the petition essentially raises for relitigation issues that were settled by this Court's denial of certiorari eight (8) years ago in a case between the same parties?

STATEMENT OF THE CASE

This suit constitutes the fourth time in approximately fourteen (14) years that respondent Maryland and Virginia Milk Producers Association, Inc. (hereinafter referred to as the "Association"), its officers, directors, accountants, attorneys and various other parties have been forced by legal process to defend

against essentially the same false, specious claims filed by the same plaintiffs, Mr. and Mrs. Frank P. Parish. The long, extremely oppressive, costly history of this seemingly endless litigation is as follows:

(i) Litigation in the Baltimore County, Maryland Circuit Court.

In January, 1965, the Parishes filed the first version of their baseless complaint in the Circuit Court for Baltimore County, Maryland (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, Equity No. 54599 78/19).

The Association and the other defendants moved to dismiss on several grounds, including total lack of jurisdiction. As a result, in February, 1965, an order of dismissal was entered by the court, and the Parishes were directed to pay costs.

(ii) Litigation in the Montgomery County, Maryland Circuit Court, The Maryland Court of Appeals, and the Supreme Court of the United States.

In February, 1965, the Parishes filed essentially the same baseless complaint against the Association, its officers, directors, attorneys, accountants and other parties in the Montgomery County, Maryland Circuit Court. The complaint was amended three (3) times, but it too was dismissed in response to demurrers filed on behalf of the Association and the other defendants.

Mr. and Mrs. Parish appealed to the Maryland Court of Appeals, which subsequently ruled that the complaint contained sufficient allegations to warrant a trial (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.*, 250 Md. 24, 242 A.2d 512 (1968)).

The oppressive, costly proceedings which thereafter ensued were described by the Maryland Court of Appeals in a later opinion it rendered in 1971 as follows (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.* 261 Md. 618, 277 A.2d 19 (1971)):

> "The docket entries take up 28 printed pages. They show that the chancellor held no less than 15 hearings on motions of one kind or another and that the trial on the merits went on without interruption for four weeks. The transcript weighs over 100 pounds; the record extract and the briefs occupy in excess of 3,000 printed pages; a dozen or more pleadings (over 100 typewritten pages) have been filed [with the Court of Appeals] since the oral arguments."

Mr. Parish, however, whose groundless, specious complaint forced the Maryland courts, the Association and a large number of individual defendants to endure that extremely heavy, long, costly litigation burden, flatly refused even to appear for discovery proceedings in the case when he was ordered to do so by the circuit court. A motion was thus filed to punish him for blatant contempt of court. Mr. Parish contended that he was suffering from a circulatory problem that had adversely affected his memory and his ability to think —and thus he contended he should not be made to testify in a court proceeding. After a full hearing, however, the circuit court granted defendants' motion, and Mr. Parish was dismissed from the case for repeated contempt of the court's orders.

Plaintiff Theodore Parish (Mr. Parish's wife), however, continued to prosecute the Montgomery County action with the same attorneys, so the case thereupon proceeded to a lengthy trial on the merits. At the con-

clusion of that trial, which lasted four (4) full weeks, the Montgomery County Circuit Court carefully reviewed the evidence, passed on each and every issue presented by the parties for decision, and dismissed the complaint.

Mr. and Mrs. Parish were not satisfied, however, so again they appealed to the Maryland Court of Appeals. This time, the Court of Appeals affirmed the circuit court's rulings in every respect (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, 261 Md. 618, 277 A.2d 19, cert. denied, 404 U.S. 940 (1971))—and at the end of its lengthy opinion, the Court stated, at 261 Md. 698:

> "Perhaps our decision here will bring this litigation to a conclusion. Thus endeth the lesson."

But, as demonstrated hereinbelow, the detailed, meticulous opinion of the Court of Appeals did not bring the litigation to an end. Mr. and Mrs. Parish filed a petition for writ of certiorari in the Supreme Court of the United States, but in due course, that petition was denied by this Court, almost eight (8) years ago (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, 404 U.S. 940, 30 L.Ed. 2d 253 (1971)).

(iii) Further Litigation in the Frederick County, Maryland Circuit Court.

Then, two (2) years later, on August 16, 1973, Mr. and Mrs. Parish suddenly decided to attempt to relitigate the entire case against the Association in the Frederick County, Maryland Circuit Court. They filed another complaint based on essentially the same old allegations and claims which had been dismissed in the Montgomery County case—and which, of course, are

again reasserted in the amended complaint dismissed by the United States District Court for Maryland and the Court of Appeals for the Fourth Circuit in the case at bar (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, Equity No. 24-465 Frederick County Cir. Ct.).

Respondent Association promptly moved to dismiss, contending the Frederick County complaint was clearly barred by the doctrines of *res judicata* and collateral estoppel. When the Frederick County Circuit Court set the Association's motion for hearing on November 16, 1973, Mr. and Mrs. Parish filed a simple "Motion for Permission to Withdraw Their Bill of Complaint" which the Frederick County Court readily granted.

(iv) The Instant Litigation in the United States District Court in Baltimore, the Fourth Circuit and in This Court.

Almost two (2) years after they withdrew their specious complaint in the Frederick County Circuit Court because it was patently barred by *res judicata*, Mr. and Mrs. Parish journeyed to Baltimore and filed essentially the same old claims which had been dismissed in the Montgomery County litigation against the Association, its officers, directors, attorneys and accountants in the United States District Court for Maryland. Motions to dismiss were filed by all defendants, and after considerable litigation, the District Court dismissed the Parishes' complaint, stating (App. to Petition, page A-11):

> "This court sits neither as a second chance forum for losing litigants nor as a court of appeals reviewing decisions of state appellate courts. Whether the analytical base is res judicata, full faith and credit, or outright lack of jurisdiction, it

is clear that plaintiffs' . . . causes of action must be dismissed."[1]

The Parishes appealed to the United States Court of Appeals for the Fourth Circuit. On *November 3, 1978,* that court unanimously affirmed the district court's judgment of dismissal, holding (App. to Petition, page A-4):

> "After our examination of the complaint and the state court opinions, we too are persuaded that the claims should have been barred on res judicata principles."

On that same day, November 3, 1978, the Clerk of the United States Court of Appeals for the Fourth Circuit addressed a memorandum to all parties and their counsel specifically advising that the Court of Appeals' judgment was entered on that date, November 3, 1978, (see Appendix A hereto).

The Parishes did *not* petition for rehearing in the Court of Appeals, and they did *not* apply to this Court, or to any Justice thereof, for an extension of time to file the instant petition for writ of certiorari with reference to the Court of Appeals' decision and judgment of November 3, 1978. ***Rather, they waited one hundred one (101) days after November 3, 1978 to file their petition for writ of certiorari in this Court on February 12, 1979.***

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[1] The district court proceeded to dismiss other causes of action inserted in the complaint on other grounds (App. to Petition, pages A-12 through A-17) and warned Mr. and Mrs. Parish as follows (page A-17):

> "Plaintiffs . . . are put on notice that any further attempt to litigate the claims . . . may result in the assessment of costs, including attorneys' fees, by any court having jurisdiction over the parties because such relitigation would be in bad faith or for purposes of harassment."

I

THE PETITION FOR CERTIORARI MUST BE DISMISSED FOR WANT OF STATUTORY JURISDICTION, SAID PETITION HAVING BEEN FILED MORE THAN NINETY (90) DAYS AFTER ENTRY OF THE COURT OF APPEALS' JUDGMENT IN VIOLATION OF 28 U.S.C. 2101(c) AND RULE 22 OF THIS COURT'S RULES

As stated above, petitioners failed (a) to file their petition for certiorari for one hundred one (101) days after entry of the Court of Appeals' judgment of November 3, 1978, and (b) to obtain any extension of time for the filing of said petition in the manner prescribed by law. Said petition for certiorari, therefore, was not filed within ninety (90) days after entry of the Court of Appeals' judgment as required by statute (28 U.S.C. 2101(c)) and by Rule 22 of the Supreme Court Rules.

Ergo, this Court is without jurisdiction over this case and the petition for certiorari must be dismissed (*Whitsitt* v. *Union Depot and Railroad Company,* 122 U.S. 363, 7 S. Ct. 1248, 30 L.Ed. 1150 (1887); *Glasgow Navigation Company, Ltd.* v. *Munson Steamship Line,* 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); *Collard* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.,* 246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); *Citizens Bank of Michigan City* v. *Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed 701 (1919); *Rust Land & Lbr. Co.* v. *Jackson,* 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); *Toledo Scale Company* v. *Computing Company,* 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed 1301; *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); *Cole* v. *Violette,* 319 U.S. 581, 63 S.Ct. 1204 (1943).

II

THE PETITION FOR CERTIORARI IS ALSO GROUNDLESS BECAUSE, IN SUBSTANCE, IT ATTEMPTS TO RAISE FOR RELITIGATION HERE ESSENTIALLY THE SAME ISSUES SETTLED EIGHT (8) YEARS AGO BY THIS COURT'S DENIAL OF CERTIORARI IN *PARISH* v. *MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.*, 261 MD. 618, 277 A.2d 19, CERT. DENIED, 404 U.S. 940 (1971)

The purpose of statutes limiting the period for appeal or to seek certiorari is to set a definite point of time when litigation shall be at an end, and to advise appellees and respondents that they are freed of the demands against them (*Matton Steamboat Co.* v. *Murphy, supra,* at 319 U.S. 415). Indeed, even if the petition "shows a proper case for . . . allowance of [the] writ [of certiorari]," the petition must nevertheless be dismissed on jurisdictional grounds if it is filed after the time fixed by statute has expired (*Rust Land & Lbr. Co.* v. *Jackson, supra,* at 250 U.S. 76).

But here, the record before the Court shows that, in substance, the petition for certiorari attempts to present questions for relitigation which have already been settled by the highest court of Maryland in a case where this Court, in turn, denied certiorari eight (8) years ago, in 1971 (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.*, 261 Md. 618, 277 A.2d 19, *cert. denied,* 404 U.S. 940 (1971).

A fortiori, the Court of Appeals for the Fourth Circuit correctly ruled in the instant case (see Appendix to Petition for Certiorari, pg. A-4):

> "After our examination of the complaint and the state court opinions, we too are persuaded that the claims should have been barred on res judicata principles."

In addition to being untimely and beyond this Court's jurisdiction, therefore, the petition herein is also groundless and patently it fails to present any important federal question or conflict in federal decisions to this Court for review. Plainly, therefore, it must be dismissed.

WHEREFORE, respondent prays that the motion to dismiss hereinabove set forth be granted and that the petition for certiorari in this case be dismissed or summarily denied.

Respectfully submitted,

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Washington, D.C. 20015

Attorney for Respondent
Maryland and Virginia Milk
Producers Association, Inc.

February 28, 1979

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that copies of respondent's opposition to petition for writ of certiorari and motion to dismiss were duly served by first class mail this 28th day of February, 1979 upon petitioners and all counsel for respondents herein.

EDWARD L. MERRIGAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

WILLIAM K. SLATE, II
CLERK

TELEPHONE 782-2213
AREA CODE 804
TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

November 3, 1978

To: Mr. Frank P. Parish, Mrs. Theodore Fisher Parish, John Rounsaville, Jr., Esq., Donald F. Copeland, Esq., Harlan L. Weiss, Esq., Albert E. Brault, Esq., Theodore R. Tenzlaff, Esq., M. Peter Moser, Esq., Robert B. Barnhouse, Esq., Alan R. Sachs, Esq., Nevett Steele, Esq., Daniel M. Clements, Esq., Edward Merrigan, Esq., Leonard Schaitman, Esq., Susan R. Chalker, Esq., William B. Sumerville, Esq., Jon H. Grube, Esq., John J. O'Neill, Esq., Thomas A. Henning, Esq., M. Natalie McSherry, Esq.

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 78-1079 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in *fifteen* copies.

When it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

Enclosures

WILLIAM K. SLATE, II
CLERK

Rev. 9-1-76